

## **Jack McConnell and Goodwin Liu: Injudicious Choices**

Following the 2010 elections, Senate Democrats announced a heightened effort to confirm the President's most controversial judicial nominees.<sup>1</sup> White House Counsel Bob Bauer indicated that confirmation of the President's judicial nominees would be a priority in the 112<sup>th</sup> Congress.<sup>2</sup>

Anti-business trial lawyer John "Jack" McConnell and Goodwin Liu, a liberal Berkeley law professor, are two of the President's most controversial and unqualified choices for the federal bench. While the Senate should continue the orderly consideration of nominations and avoid the reflexive partisan obstruction of presidential nominations practiced by the Democrats<sup>3</sup> during the Bush years, no nominee is owed a lifetime appointment.

### **Jack McConnell, of Rhode Island, to the District Court**

Mr. McConnell is a plaintiff's trial lawyer (and prolific Democratic campaign donor<sup>4</sup>) who has made his fortune suing American business. Mr. McConnell's long and charged quest to target business has led to the U.S. Chamber of Commerce formally opposing his nomination – an extraordinary fact as the Chamber has never opposed a district court nomination in its history. In a letter to Senators, the Chamber stated "we are concerned that Mr. McConnell's apparent bias against business defendants, underlying judicial philosophy, and questionable respect for the rule of law, will lead to the multiplication of baseless lawsuits."<sup>5</sup>

Mr. McConnell has cast his litigation in crusade-like terms that raise serious questions about his commitment to the rule of law. His passionate advocacy has led him to advance baseless legal theories such as one that would have held companies liable for injuries that did not involve products they sold.<sup>6</sup> When the Rhode Island Supreme Court unanimously ruled against him in a lead paint case, he published an op-ed characterizing the decision as one that "let wrongdoers off the hook."<sup>7</sup> This quote is typical of how Mr. McConnell appears to view the law not through the lens of what is legally right or wrong, but according to what he sees as morally right or wrong. Mr. McConnell has explicitly stated "there are wrongs that need to be righted and that is how I see the law."<sup>8</sup> This view of the law is inconsistent with the important but limited role of a judge: applying the law to the facts, not picking winners and losers.

Concerns also have been raised about Mr. McConnell's candor in his testimony before the Senate. In response to questions concerning allegedly misappropriated documents in a lead paint case, Mr. McConnell minimized his involvement with the matter. However, he later gave testimony in a deposition that suggested he was considerably more involved than he had indicated to the Senate. The Wall Street Journal recently concluded that Mr. McConnell's "changing story about his lead paint advocacy is enough by itself to disqualify him from the bench."<sup>9</sup>

### **Goodwin Liu, of California, to the Ninth Circuit Court of Appeals**

Professor Liu is an outspoken law professor who has spent nearly his entire brief career in academia advocating for left-wing ideological and jurisprudential positions. He has never been a judge and has

spent virtually no time in the practice of law.<sup>10</sup> With no track record as a judge or a practicing lawyer, the Senate has only Professor Liu's record as an academic and public commentator to assess his fitness for the weighty responsibility with which he would be entrusted.

Unfortunately, this record suggests a dogged commitment to a left-wing agenda, flashes of intemperate rhetoric, and a conception of the Constitution unmoored from its textual and historic meaning. Among other things, he has taken the position that the Constitution compels states to recognize gay marriage<sup>11</sup> and that it can be construed to establish "welfare rights," which courts should play a significant role in defining.<sup>12</sup> He has also served as chairman of the liberal American Constitution Society, which, according to its website, "generates 'intellectual capital' for ready use by progressive allies and shapes debate on key legal and public policy issues."<sup>13</sup>

While Professor Liu now asks the Senate to ignore his record and give him the benefit of the doubt, he testified forcefully and harshly against Justice Alito's confirmation in 2006. Assessing the record of the long serving appellate judge, professor Liu said: "Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance ... where a black man may be sentenced to death by an all-white jury for killing a white man ... and where police may search what a warrant permits, and then some."<sup>14</sup> This overheated attack on a well-respected jurist raises real questions about professor Liu's judicial temperament.

Presidents may choose whomever they please for most political appointments. However, the special role of federal judges as unbiased umpires protecting the rule of law requires that nominees for the bench meet a different standard. Mr. McConnell and Professor Liu simply fail to meet that standard.

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<sup>1</sup> "Democrats Plan Votes on Controversial Nominees, Senator Says," Blog of the Legal Times, November 17, 2010, <http://goo.gl/QM2ES>

<sup>2</sup> "Judicial Nominations in 2011," Bob Bauer, Address to the American Constitution Society Symposium on Judicial Nominations, February 2, 2011, <http://goo.gl/dJsOp>

<sup>3</sup> Including, notably, then Senators Obama and Biden.

<sup>4</sup> Mr. McConnell and his wife have given at least \$700,000 of their own money to help elect Democrats. "McConnell, Others Renominated by Obama," John O'Brien, Legal Newline, January 6, 2011, <http://goo.gl/PnDOW>

<sup>5</sup> U.S. Chamber of Commerce, letter to Senate Judiciary Committee, March 30, 2011.

<sup>6</sup> "The Judge from Motley Rice," Wall Street Journal, June 7, 2010. <http://goo.gl/Wakah>

<sup>7</sup> "The Rhode Island Supreme Court got it Terribly Wrong In Its Decision In the Recent Lead-Paint Case," Jack McConnell et al, Providence Journal, Aug. 19, 2008, <http://goo.gl/LGSIfj>.

<sup>8</sup> M. Charles Bakst, "Jack McConnell: Taking on the Bad Guys," Providence Journal, Mar. 7, 2005

<sup>9</sup> "Painting the Bench Green: A Tort Kingpin Doesn't Deserve a Federal Judgeship," Wall Street Journal, April 16, 2011, <http://goo.gl/S9iNs>.

<sup>10</sup> Senate Judiciary Committee Questionnaire, <http://goo.gl/9enZZ>

<sup>11</sup> Professor Liu signed an amicus brief to this effect. *In re Marriage Cases*, 43 Cal. 4<sup>th</sup> 757 (2008). See "Goodwin Liu on a Federal Right Federal Constitutional Right to Same-Sex Marriage," by Ed Whelan, National Review Online, March 1, 2010, <http://goo.gl/iibBL>

<sup>12</sup> E.g., "Rethinking Constitutional Welfare Rights," Goodwin Liu, 61 Stan. L. Rev. 203 (2000), <http://goo.gl/Lb9LN>

<sup>13</sup> "About ACS: Shaping Debate, Building Networks, Making a Difference," <http://goo.gl/G1NUB>.

<sup>14</sup> Testimony of Professor Goodwin Liu Before the United States Senate Committee on the Judiciary on the Nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court, <http://goo.gl/cv44H>